

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRYSTAL SCHWEERS
Claimant

VS.

BEECH AIRCRAFT CORPORATION
Respondent
Self-Insured

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 141,403

ORDER

Claimant and the Kansas Workers Compensation Fund both appeal an Award of Administrative Law Judge Shannon S. Krysl dated June 10, 1994. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

The claimant appeared by her attorney, Thomas Hammond of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Steven L. Foulston of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of June 10, 1994. The claimant and respondent, however, stipulated at the regular hearing that the deposition of Larry Oakley which is listed in the record of the Award should be withdrawn from this proceeding and not considered as evidence. This particular deposition was taken prior to the Kansas Workers Compensation Fund being impleaded.

ISSUES

Both claimant and the Kansas Workers Compensation Fund (Fund) ask for Appeals Board review of the issue of the nature and extent of claimant's disability. Additionally, the Fund requests Appeals Board review of the Fund liability question.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing the arguments and considering the briefs of the parties, the Appeals Board finds as follows:

(1) The Administrative Law Judge's Award found the claimant entitled to a twenty-five percent (25%) permanent partial general work disability. The Fund argues that the claimant was not entitled to a work disability because the evidentiary record established that the presumption of no work disability contained in K.S.A. 1989 Supp. 44-510e(a) applied to this case. Additionally, even if the presumption of no work disability did not apply, claimant was not entitled to a work disability because of her preexisting permanent work restrictions. On the other hand, claimant takes the position that the credible evidence in the record established that she is entitled to a work disability and that the work disability found by the Administrative Law Judge in the amount of twenty-five percent (25%) should be increased. For the reasons expressed below, the Appeals Board finds that the claimant has established that she is entitled to a work disability and the Administrative Law Judge's finding on this issue should be modified.

Claimant injured her low back on July 26, 1989 while performing the job of a tool puller. This was not claimant's regular job, at that time, as she was filling in for a person who was absent. Claimant suffered the injury to her low back when she was handling a one hundred fifty (150) pound tool. Claimant continued to work on her regular job as an audit clerk between July 26, 1989 and September 25, 1989. During that period of time, her symptoms increased from having to work all day on her feet. Her family physician, Dr. Stephen J. Schneider, took her off of work on September 26, 1989 because of the increased symptoms. While claimant was off work she received a notice on October 31, 1989 from the respondent that she was going to be terminated for excessive absenteeism unless she contacted the respondent on October 30, 1989, one day before she received the notice. Claimant testified that the reason she had absenteeism problems was because of her work-related back injury. Claimant sought reinstatement through the union/management grievance procedure but was not returned to work by respondent.

Claimant received conservative treatment from Dr. Schneider and then from Dr. Pollock, an orthopedic surgeon, at the direction of the respondent. Dr. Pollock released claimant to return to work with no restrictions in May of 1991. After the release, a vocational rehabilitation consultant determined that the claimant could return to her regular job as an audit clerk. The vocational rehabilitation consultant contacted the respondent who did not return the claimant to work, indicating it did not have a job opening for claimant.

On August 14, 1991, the claimant was examined and evaluated by Ernest R. Schlachter, M.D. Dr. Schlachter opined that claimant had a chronic lumbar sacral sprain which resulted in a ten percent (10%) permanent partial impairment of function to the body as a whole. Dr. Schlachter placed permanent work restrictions on the claimant of no repetitive lifting over thirty to thirty-five (30-35) pounds; no single lifts over forty (40) pounds; no repetitive bending, twisting or working in awkward positions; and claimant should have a job that would allow alternating sitting and standing. The only functional impairment rating which is contained in the evidentiary record is Dr. Schlachter's ten percent (10%) rating which is, therefore, adopted by the Appeals Board as claimant's functional impairment rating as a result of this injury. The Appeals Board finds that the evidentiary record has established the claimant was terminated by the respondent for excessive absenteeism, but further finds that the absenteeism was primarily related to her work-connected low back injury. At the regular hearing, the claimant testified that she was earning four dollars and seventy-five cents (\$4.75) per hour working as a security guard. The parties stipulated that claimant's average weekly wage while working for the respondent was five hundred seventy-eight dollars and twenty-one cents (\$578.21). The Appeals Board finds that the respondent did not offer the claimant a job at a comparable wage after she was released to return to work. Therefore, the presumption of no work

disability contained in K.S.A. 1989 Supp. 44-510e(a) does not apply. If the no work disability presumption does not apply, then the claimant is eligible for work disability, if such work disability exceeds claimant's functional impairment rating. See K.S.A. 1989 Supp. 44-510e(a).

Work disability evidence was presented through vocational experts, Jerry Hardin on behalf of the claimant and Karen Terrill on behalf of the respondent. The claimant encourages the adoption of Mr. Hardin's opinions while the Fund claims Ms. Terrill's opinions are the most credible. Jerry Hardin's personal opinion was that claimant had lost thirty-five to forty percent (35-40%) of her ability to perform work in the open labor market as a result of her injury. Mr. Hardin utilized Dr. Schlachter's permanent work restrictions in arriving at this percentage. On the other hand, Ms. Terrill testified that claimant had no labor market loss as claimant had preexisting work restrictions that were the same as her current work restrictions. Claimant's testimony, along with the medical records that were offered and admitted into evidence in this case, substantiate that claimant had a number of injuries to her back and her upper extremities prior to this accidental injury. However, other than a fifty (50) pound weight lifting limit placed on the claimant by her family physician, Dr. Thomas, in 1981, the Appeals Board finds the only prior permanent restriction was contained in a December 6, 1985 Beech medical record that limited claimant to four hours crouching, four hours stooping and lifting, carrying, pushing and pulling of thirty (30) pounds. The Appeals Board further finds that the respondent required claimant to work outside of those restrictions. For example, when the claimant was injured on July 26, 1989, she was working as a tool puller, which required her to handle a one hundred fifty (150) pound tool. The Appeals Board finds that the testimony of Mr. Hardin should be considered as the most persuasive and credible evidence in reference to the issue of claimant's work disability. Mr. Hardin testified that he took into consideration claimant's preexisting fifty (50) pound lifting restriction when he determined claimant's pre-injury labor market. Accordingly, the Appeals Board adopts Mr. Hardin's opinion that the claimant suffered a thirty-five to forty percent (35-40%) loss in her ability to perform work in the open labor market.

The second component of the work disability test, loss of ability to earn a comparable wage, should be determined by comparing claimant's stipulated pre-injury average weekly wage of five hundred seventy-eight dollars and twenty-one cents (\$578.21) with her ability to earn seven dollars (\$7.00) per hour. Claimant testified that her potential earning ability for her present job as a dispatcher was seven dollars (\$7.00) per hour. Claimant did successfully complete a vocational rehabilitation plan which qualified her as a computer assisted drafter. However, claimant testified because of the large number of layoffs in the airplane industry in Wichita, Kansas, she was unable to find a job utilizing these acquired skills. Mr. Hardin testified that claimant had a sixty-two percent (62%) loss of ability to earn a comparable wage by comparing a pre-injury weekly wage of four hundred seventy-two dollars (\$472.00) to claimant's ability to earn a post-injury weekly wage of one hundred eighty dollars (\$180.00). Accordingly, the Appeals Board finds that claimant's appropriate loss of ability to earn a comparable wage should be determined by comparing her pre-injury average weekly wage of five hundred seventy-eight dollars and twenty-one cents (\$578.21) with her present ability to earn two hundred eighty dollars (\$280.00) per week. The Appeals Board, therefore, finds that the claimant has a loss of ability to earn a comparable wage in the amount of fifty-two percent (52%).

The Administrative Law Judge found that the claimant was entitled to a work disability in the amount of twenty-five percent (25%). She arrived at this percentage by equally considering Ms. Terrill's opinions and Mr. Hardin's opinions. The Appeals Board, however, finds that the appropriate work disability in this case is forty-five percent (45%). The labor market loss of thirty-seven and one-half percent (37.5%) based on Mr. Hardin's opinion, which took into consideration claimant's preexisting fifty (50) pound lifting restrictions, should be weighed equally with claimant's comparable wage loss of fifty-two

percent (52%). See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(2) The Administrative Law Judge found that liability should be shifted from the respondent to the Fund for all compensation benefits and costs awarded in this case. The Appeals Board affirms this finding and adopts the Administrative Law Judge's reasoning and analysis as its own.

The claimant had previous injuries both to her back and to her upper extremities which resulted in a permanent work restriction of limited lifting up to fifty (50) pounds. This work restriction was placed on the claimant after she injured her low back while employed by the respondent in 1981. Dr. Schlachter was asked whether claimant sustained any permanent functional impairment due to the 1981 injury. He opined that the claimant had sustained a five percent (5%) permanent partial functional disability at that time. Dr. Schlachter also testified that claimant's current disability would not have occurred but for her preexisting back problems. Accordingly, respondent established one hundred percent (100%) Fund liability by presenting evidence that it had knowledge of claimant's preexisting impairment and such impairment constituted a handicap in claimant's retaining and obtaining employment. Dr. Schlachter's medical opinion also established that claimant's current disability would not have occurred but for the preexisting back injury. See K.S.A. 1989 Supp. 44-567.

The Fund also argued that it should have been dismissed from these proceedings because it was not impleaded as required by K.S.A. 1989 Supp. 44-567(d) prior to the first full hearing when evidence was presented on the claim. The evidentiary deposition of Larry Oakley, former supervisor of workers compensation for the respondent, was taken by the claimant prior to the impleading of the Fund. However, at the regular hearing, the respondent and the claimant agreed to withdraw this deposition and not to include it in the record of evidence in deciding the case. The Administrative Law Judge listed the deposition in her Award but after being contacted by agreement of the parties indicated that she had not considered the deposition in deciding the case. Therefore, the Appeals Board finds that since the deposition was not part of the evidentiary record of the case, the Fund's argument is moot.

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge contained in her Award that are not inconsistent with the specific findings made in this order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated June 10, 1994 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Crystal Schweers, and against the respondent, Beech Aircraft Corp., a self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred September 25, 1989, and based upon an average weekly wage with fringe benefits of \$578.21.

Claimant is entitled to 161 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$43,631.00, followed by 254 weeks at the rate of \$173.47 per week in the sum of \$44,061.38, for a 45% permanent partial general work disability, making a total award of \$87,692.38.

As of February 28, 1996, there is due and owing claimant 161 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$43,631.00, followed by 174.43 weeks of permanent partial disability compensation at the rate of \$173.47 per week in the sum of \$30,258.37, for a total of \$73,889.37 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$13,803.01 is to be paid for 79.57 weeks at the rate of \$173.47 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is ordered to pay all compensation benefits and costs of this award.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Workers Compensation Fund to be paid direct as follows:

Ireland and Barber	
Deposition of Larry Oakley	\$133.90
Deposition of Preliminary Hearing	\$190.70
Deposition Services	
Transcript of Preliminary Hearing	\$101.20
Transcript of Preliminary Hearing	\$ 79.00
Barber & Associates	
Transcript of Regular Hearing	\$335.25
Deposition of Ernest R. Schlachter, M.D.	\$212.10
Deposition of Jerry D. Hardin	\$313.60
Deposition of Karen Terrill	\$175.40

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tom Hammond, Wichita, Kansas
Terry Torline, Wichita, Kansas
Steven Foulston, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director